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No. 90-361

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In the Supreme Court of the United States

OCTOBER TERM, 1990

KENRICH PETROCHEMICALS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), empowers the National Labor Relations Board to order the reinstatement with backpay of a supervisor who was discharged in retaliation for the union activities of employee members of her family.

2. Whether, if the Board has such authority, that authority was abused in the circumstances of this case.

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OPINIONS BELOW

The en banc decision of the court of appeals (Pet. App. 1a-44a) is reported at 907 F.2d 400. The panel decision (Pet. App. 146a-189a) is reported at 893 F.2d 1468. The decision and order of the National Labor Relations Board (Pet. App. 143a-145a), including the decision and recommended order of the administrative law judge (Pet. App. 45a-142a), are reported at 294 N.L.R.B. No. 41.

JURISDICTION

The judgment of the en banc court was filed on July 9, 1990. The petition for a writ of certiorari was filed on August 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures and sells resins, plastics, dispersions, and coupling agents. Pet. App. 47a. Its seven office clerical employees were supervised by Office Manager Helen Chizmar, who had worked for petitioner for 24 years. Pet. App. 48a; A 198-199.[1] Helen Chizmar was related to three members of the clerical staff: Barbara Knorowski, her sister; Karen McPartlan, her daughter; and Catherine Chizmar, her daughter-in-law. Pet. App. 48a.

For many years, petitioner's production employees were represented by Local 8-406, Oil, Chemical and Atomic Workers International Union, AFL-CIO (the Union). Pet. App. 48a.[2] In May 1987, the Union began an organizing campaign among petitioner's office clerical employees. *Ibid.* The Board found that petitioner responded to the organizing campaign by threatening its employees with more onerous working conditions, loss of existing benefits, and other reprisals, including discharge, if they selected the Union as their representative; by changing the working hours of Barbara Knorowski and Karen McPartlan and removing McPartlan's telephone; and by requiring McPartlan, Knorowski, and Catherine Chizmar to be examined by the Company physician prior to returning to work. Pet. App. 132a-133a.[3]

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[1] "A" references are to the excerpts of the administrative record filed with the court of appeals.

[2] Helen Chizmar's father, a former employee of petitioner, was a key organizer of the production employees and served as the production unit's first shop steward. Pet. App. 48a.

[3] Petitioner did not challenge any of these unfair labor practice findings in the court of appeals, and the portion of

2. The only issue raised in the petition concerns the discharge by petitioner of Helen Chizmar, and the Board's order that she be reinstated with backpay. The facts concerning her discharge are as follows:

After all the clerical employees signed authorization cards for the Union, they informed Helen Chizmar that they had done so. Pet. App. 48a, 50a. Chizmar said she was shocked and asked why they had selected the Union. Judy Kobryn, one of the clerical employees, explained their reasons for wanting to join the Union and added, "[t]here's nothing you could do about it really, Helen, the letter [from the Union to petitioner] should be here by tomorrow." *Id.* at 50a-51a.

On May 22, petitioner's president, Salvatore Monte, received the Union's letter, which sought recognition and stated that the seven clerical employees had unanimously selected it to represent them. Pet. App. 48a-49a. Monte, who felt "betrayed" by the employees, attempted to determine the degree of employee support for the Union. *Ibid.* He concluded that McPartlan and Knorowski would support the Union because they were closely related to the

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the Board's order based on them was summarily enforced by the court. Pet. App. 147-148a.

The Board also found that petitioner committed additional violations of the Act by assaulting Knorowski, causing her to be absent from work, and failing to reemploy her; by causing Catherine Chizmar to be absent from work; by discharging McPartlan because of her union activity; and by discharging Helen Chizmar because of the union activities of her relatives. Pet. App. 133a. The court of appeals upheld all of these findings except those regarding McPartlan's discharge, which the court remanded to the Board for further consideration. *Id.* at 182a-187a.

Union's first shop steward and "the family is not going to back off from this position of going for the Union. * * *[I]t's in the family culture." *Id.* at 49a.

On May 29, petitioner received a copy of the Union's petition to the Board seeking to represent the clerical employees. Later that day, Monte called Helen Chizmar into his office, informed her that she was fired,[4] Pet. App. 51a, and then told Jill Bernicker, petitioner's buyer, that Chizmar was discharged because "[he] couldn't keep her for financial reasons and [he] was not going to put up with any union bullshit." *Id.* at 52a. That evening, Bernicker informed Knorowski, Kobryn, McPartlan, and Catherine and Helen Chizmar of her conversation with Monte. *Ibid.* A few weeks later, Catherine Chizmar expressed concern to Charles Lucania, a Kenrich Vice President, that her job was in jeopardy because of the discharge of Helen Chizmar (her mother-in-law), and because of the change in hours for her other relatives, Knorowski and McPartlan. *Id.* at 48a, 53a.

After winning a representative election held on July 2, the Union was certified by the Board as the clerical employees' bargaining representative. Pet. App. 50a. During subsequent negotiations with the Union, Monte remarked that he was going to "get rid of the whole [Chizmar] family." *Id.* at 97a.

3. The administrative law judge, whose decision was affirmed by the Board (Pet. App. 143a-145a), found that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by discharging Helen Chizmar. Pet. App. 133a. The ALJ noted that "[i]t

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[4] Petitioner stated that the company had "to let [her] go * * * [because it] can't afford [her] anymore * * * [and] can get somebody for $20,000 less * * * [which it] plan[s] to do." Pet. App. 51a.

is well established that a discharge of a supervisory employee because of the Union activities of employees who were members of the supervisors' [*sic*] family, is violative of Section 8(a)(1) of the Act." Pet. App. 94a-95a. Citing *Advertiser's Mfg. Co.*, 280 N.L.R.B. 1185 (1986), enforced, 823 F.2d 1086 (7th Cir. 1987), the ALJ explained that "[s]uch a discharge, resulting not from any participation in union or concerted activities by the supervisor, but from the exercise of Section 7 rights of the employees, has the direct, severe and unmistakable thrust of interfering with those employee relatives in the exercise of their rights." Pet. App. 95a.

The ALJ found that petitioner had discharged Helen Chizmar in retaliation for her relatives' protected activity. Pet. App. 94a-98a. He concluded that the evidence did not support petitioner's contention that Chizmar was discharged because of a conflict of interest created by the unionization of her relatives. *Id.* at 99a. The ALJ noted that petitioner had never offered that ground for discharging Chizmar prior to the unfair labor practice hearing (*id.* at 99a-100a), had tolerated complaints from employees concerning Chizmar's alleged favoritism toward her relatives for a number of years without ever discussing the issue with Chizmar (*id.* at 101), and had discharged her without even knowing whether the Union would succeed in its organizing campaign (*id.* at 101a-102a). The ALJ concluded that Monte was not actually concerned about "any future problems that might arise with respect to [Chizmar's] carrying out her management responsibilities." Rather, the focus of his concern was her disloyalty in not "nipping in the bud the efforts of her relatives to organize" and the employee-relatives' disloyalty in choosing to unionize. *Id.* at 102a-103a.

The ALJ recommended that Chizmar be reinstated with backpay. *Id.* at 134a, 137a. In affirming the ALJ's decision, the Board agreed that "the asserted conflict of loyalty argument was pretextual." *Id.* at 144a n.2.

4. A panel of the court of appeals upheld the Board's conclusion that petitioner violated Section 8(a)(1) of the Act by discharging Helen Chizmar, noting that "the Board and the ALJ certainly were justified in finding that petitioner's belated explanation for the discharge was pretextual and [its] sole intent was to retaliate against Chizmar's relatives for attempting to unionize." Pet. App. 170a.

The panel majority concluded, however, that the Board had improperly ordered Chizmar's reinstatement. The majority asserted that, when an employer unlawfully discharges a relative-supervisor solely to discourage the relative-employees' union activity, a reinstatement remedy is "permissible only if" the employer successfully destroys the employees' organizational rights. Pet. App. 172a-173a. Because the Union prevailed in the representation election, the majority concluded, Chizmar's discharge had not undermined Union support. *Id.* at 173a. Therefore, the Board's order did "not serve any legitimate remedial purpose under the Act." *Id.* at 175a.

5. The court of appeals, sitting en banc, reversed the panel's decision. Pet. App. 3a. The court concluded that "the Board did not abuse its broad discretion" in ordering Chizmar's reinstatement with back pay because that remedy was "reasonably calculated to dispel the intimidation caused by her firing." *Id.* at 27a.

Initially, the court rejected the contention that the Board lacks power to order reinstatement of supervisors "because the Act does not protect a supervisor

who engages in union activity. * * * While it is uncontestably true that the Act does not protect a supervisor from being discharged for engaging in concerted activity, this does not deprive the Board of the authority to order the reinstatement of a supervisor whose firing resulted not from her own pro-union conduct, but from the employer's efforts to thwart the exercise of section 7 rights by protected rank-and-file employees." Pet. App. 13a.

The court noted that every court of appeals to address the issue has upheld the Board's power to order the reinstatement of supervisors in appropriate circumstances. Pet. App. 13a-14a. The court added that "[t]o the extent it can be argued that this question is ambiguously addressed by the statute, we believe the Board's long-standing interpretation of the Act as giving it the power to reinstate supervisors fired in violation of section 8(a)(1) is reasonable, and therefore owed deference. *NLRB v. United Food & Commercial Workers, Local 23*, 484 U.S. 112, 123 (1987)." Pet. App. 14a n.5.

The court disagreed with petitioner's contention that, because the employees' organizational rights were vindicated by the election of the Union, the reinstatement order did not serve a valid remedial purpose. Pet. App. 14a-15a. The court noted that, as a general matter, a discharge such as Chizmar's "must communicate to rank-and-file employees that the employer is willing to go to any lengths to crush section 7 activity." *Id.* at 16a. Moreover, the record evidence demonstrated that "Helen Chizmar's firing caused Catherine Chizmar to fear for her own job security despite her protected status." *Ibid.*

The court expressed disagreement with petitioner's argument that "the union's success in the election

provides adequate assurance" that any coercive effect of the firing of Helen Chizmar "has been fully dissipated and requires no remedial action." Pet. App. 16a. The court explained that "the collective bargaining process is an ongoing one in which employees have repeated opportunities to exercise their section 7 rights." Thus, "despite the union's success at the ballot box, many opportunities remained for the coercive impact of Helen Chizmar's discharge to take its toll on section 7 rights." *Ibid.* The court also noted that "the record reflects specific support for the conclusion that the effects of Kenrich's coercive conduct, if left unremediated, would be felt long after the election." *Id.* at 19a. The court concluded that "reinstatement in this situation, as in cases where supervisors are dismissed for failing to commit unfair labor practices, serves to dispel employees' fears and concomitant reluctance to fully exercise their rights, by demonstrating that the law sets boundaries on employers' ability to engage in this sort of conduct with impunity." *Id.* at 26a.[5]

Judge Greenberg, joined by Judges Garth and Hutchinson, dissented. In their view, Chizmar's reinstatement would serve no "legitimate remedial purpose." Pet. App. 27a. In addition, it would necessarily create "an actual conflict between her loyalties

[5] As the court further explained (Pet. App. 20a):

> By reinstating Chizmar and compensating her for lost wages, the Board's order protects the section 7 rights of Kenrich's employees by assuring them that they need not fear that the exercise of their rights will give the company a license to inflict harm on their family. It also protects the employees by reassuring their relatives who are supervisors that they need not feel that their jobs are dependent on their ability to dissuade their family members from engaging in protected activity.

to Kenrich and to her relatives, so long as they are employed by Kenrich." *Id.* at 29a. Because petitioner would be entitled to discharge Chizmar "soon after her reinstatement, in which case the adverse impact on her relatives" would be the same as if she had never been reinstated, the dissent was unable to "fathom how the policies underlying the Act" would be served by the reinstatement order. *Id.* at 33a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decisions of this Court or of any other court of appeals. Review by this Court therefore is unwarranted.

1. Petitioner does not challenge the Board's finding, upheld by the court of appeals, that it unlawfully discharged Helen Chizmar because her relatives sought to be represented by the Union. See Pet. 8. Rather, petitioner contends (Pet. 11) that Section 10(c) of the Act, 29 U.S.C. 160(c), precludes the Board from ordering that supervisors be reinstated with back pay because that Section authorizes the Board to grant such affirmative relief only to "employees,"[*] and supervisors are not employees under the Act (see 29 U.S.C. 152(3) and (11)). That argument is without merit. In *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941), this Court held that the specific inclusion in Section 10(c) of authority to order reinstatement of employees did not preclude

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[*] Section 10(c) provides that the Board may require a person found to have committed an unfair labor practice "to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

the Board from ordering the reinstatement of applicants for employment who were denied jobs because of their union affiliation. The Court explained (313 U.S. at 189):

> To attribute such a [preclusive] function to the participial phrase [in Section 10(c)] introduced by 'including' is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board. * * *

That reasoning is equally applicable to reinstatement of supervisors where that remedy would effectuate the policies of the Act. As the Fifth Circuit stated in a seminal case, *NLRB* v. *Talladega Cotton Factory, Inc.*, 213 F.2d 209, 217 (1954), "[t]he contention that the discharge of supervisors for refusal to violate the Act may be effected with impunity because of their supervisory status evinces undue preoccupation with the statutory definition, rather than with the underlying purpose and intent of the Act as a whole." The court explained (*ibid.*):

> Though the Board concededly has no authority, statutory or otherwise, to reinstate supervisors as "employees" to redress their private grievance and penalize respondent, we see no reason why the Board, in the exercise of its statutory discretion, does not have the same remedial power to redress acts of indirect interference and restraint of ordinary employees through discharge of supervisors, as it admittedly has to redress acts of direct interference and restraint with the rights of the same employees to uninhibited self-organization. * * *

Similarly, as the Seventh Circuit observed in upholding the Board's reinstatement of a supervisor who was discharged in retaliation for her son's union activities:

> Carol Hahn [the supervisor] is not being reinstated so that she can help the union but so that Ronald Hahn [her son] and other protected employees will not be deterred from exercising their rights under section 7 by fear that if they do the company will try to get back at them, in any way it can, including by firing their relatives. * * *

NLRB v. *Advertisers Mfg. Co.*, 823 F.2d 1086, 1089 (1987).[7]

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[7] As petitioner acknowledges (Pet. 11 n.4), every court of appeals to consider the question has held that the Board has the power to order the reinstatement of supervisors in appropriate circumstances. See cases cited by the court of appeals at Pet. App. 13a-14a. See also *Local No. 207, Iron Workers* v. *Perko*, 373 U.S. 701, 707-708 (1963) (citing *Talladega Cotton* for the proposition that the Board's reinstatement of a supervisor would be appropriate if the supervisor's discharge reasonably caused "nonsupervisory employees to fear that they might meet the same fate if they adhered to the union"); *Florida Power & Light Co.* v. *IBEW*, 417 U.S. 790, 808 n.18 (1974) (citing *Talladega Cotton* in acknowledging the Board's power to order reinstatement of supervisors in appropriate circumstances).

Moreover, petitioner is clearly in error in asserting (Pet. 9-10) that the Board's interpretation of the scope of its authority under Section 10(c) is not entitled to deference. This Court has "traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute." *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123-124 (1987). In any event, this Court's decision in *Phelps Dodge*, and its repeated approval of the Seventh Circuit's decision in *Talladega Cotton*, validate the reason-

2. a. Petitioner is not entitled to attack (Pet. 14-24) the propriety of a reinstatement remedy under the particular circumstances of this case. As the court of appeals noted (Pet. App. 14a-15a n.6), petitioner, in its arguments to the Board, did not object to the ALJ's recommendation that Helen Chizmar be reinstated. Before the Board and in its initial briefs to the court of appeals, petitioner contended only that Chizmar's dismissal did not violate Section 8(a)(1) of the Act. Following the initial briefing, the court of appeals panel requested the parties to address an issue of law—whether Chizmar's reinstatement was consistent with the statutory exclusion of supervisors from the Act's protection. (As petitioner notes (Pet. 6 n.3), the Board did not object to the panel's consideration of that issue.) See also Pet. App. 15a n.6.

Under Section 10(e) of the Act, 29 U.S.C. 160(e), reviewing courts lack jurisdiction, in the absence of extraordinary circumstances, to consider objections not raised before the Board. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). The requirement of Section 10(e) is not "'waived' simply because the [agency] fails to invoke it." *EEOC* v. *FLRA*, 476 U.S. 19, 23-24 (1986). Accordingly, petitioner may not assert the claim that, in the circumstances of this case, Chizmar's reinstatement would not effectuate the policies of the Act.[8]

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ableness of the Board's assessment that it retains authority under Section 10(c) to order reinstatement in certain circumstances of an individual who is not an employee.

[8] It is true that the panel did nevertheless directly consider this question in ruling that, while the Act did not preclude the Board from ordering the reinstatement of supervisors in some circumstances, it would not effectuate the policies of the Act

b. In any event, petitioner's contention (Pet. 17-19, 22) that the reinstatement of Helen Chizmar would create a conflict of interest in supervising her unionized relatives finds no support in the record. As found by the Board and upheld by the court of appeals, petitioner's claim that it discharged Chizmar out of concern for such a conflict of interest was pretextual. Petitioner does not challenge that finding here (Pet. 8).[9]

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to order such reinstatement in the circumstances here. Upon the Board's petition for rehearing, however, the court en banc reversed the panel's decision.

Because the issue whether the Board may order reinstatement of a supervisor in *any* circumstances goes to the boundaries of the Board's authority under the statute, consideration of *that* question by the court of appeals on its own motion (and this Court on review) would probably be permitted under Section 10(e). See, *e.g.*, *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961) (objections to remedial order not raised to Board may not be raised "[a]t least when the Board has not 'patently traveled outside the orbit of its authority,' *Labor Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388").

[9] Indeed, there is every indication that Chizmar was "on the company's side" and "did not assist in her [relatives'] union activities." Thus, the reinstatement order does not require the "company * * * to grasp a viper to its bosom." *NLRB* v. *Advertisers Mfg. Co.*, 823 F.2d at 1089.

Moreover, as the court of appeals noted (Pet. App. 21a n.9),

> [b]ecause the Board found as a matter of fact that Kenrich was not motivated by fears of a conflict of interest, it did not have occasion to consider the substantial question of whether the Act is violated when an employer who has tolerated a supervisor's family-related conflict of interest for a lengthy period of time decides that he

c. There is no merit in petitioner's contention (Pet. 19-21) that a reinstatement remedy is not necessary to make the clerical workers whole because they were not deterred by Helen Chizmar's dismissal from selecting the Union as their representative. As the court of appeals noted, "the collective bargaining process is an ongoing one" and "the record reflects specific support for the conclusion that the effects of Kenrich's coercive conduct, if left unremediated, would be felt long after the election." Pet. App. 16a, 19a. This conclusion is reasonable and finds support in the record.[10] Therefore, no further review is warranted.

> will no longer tolerate that conflict because the supervisor's relatives have now unionized.

The court continued (*ibid.*):

> If Kenrich discharges Chizmar upon her reinstatement and an unfair labor practice proceeding is commenced, the balance the Board strikes in that proceeding between Kenrich's right to loyalty from its supervisors and its employees' Section 7 rights will be entitled to appropriate deference by this court.
>
> In such a proceeding, the Board will be able to consider whether a subsequent discharge is truly attributable to Kenrich's belief that Chizmar cannot effectively perform her responsibilities or whether the discharge is merely a remnant of hostility Kenrich feels toward its clerical workers because of their support for the union. * * *
>
> * * * The fact that Kenrich may * * * dismiss [Chizmar following reinstatement] for reasons that are lawful does not differentiate this from numerous other cases in which reinstatement has been ordered following a discharge for an impermissible reason.

[10] Petitioner's assertion that the backpay award is "nothing other than punitive" (Pet. 22) is also without merit. As the court below explained, "[b]y reinstating Chizmar, *and compensating her for her lost wages*, the Board's order protects the section 7 rights of Kenrich's employees by assuring them

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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that they need not fear that the exercise of their rights will inflict harm on their families." Pet. App. 20a (emphasis added). Thus, back pay is an appropriate part of a Board remedy designed to assuage employee fears of retaliation for engaging in protected activities.

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